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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1414

WILLIAM W. RABIN,

vs.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Opinion of Appeals Court Appended.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. .....

WILLIAM W. RABIN,

vs.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals has not yet been reported. A copy has been here appended.

JURISDICTION.

The date of the judgment to be reviewed is April 25, 1963. Jurisdiction to issue the writ is found in § 240 of the Judicial Code as amended, 28 U. S. C. A. § 1254.

QUESTIONS PRESENTED.

1. (a) The prosecution must prove that the alleged unlawful taking which occurred outside the territorial limits of the United States was such a crime as to come within the purview of Section 2315, Title 18, of the United States Code.

1. (b) The Courts of the United States cannot take judicial notice of, nor presume the law of a foreign country.

2. It is not possible for a defendant to obtain a fair trial where he is named individually in the first four counts of a multiple count indictment and jointly with three other defendants in the remaining five counts, all incorporating the same offense or offenses when the prosecution introduces under the conspiracy count of which he was acquitted prejudicial evidence which could not be admitted to support the charges in the substantive counts.

PETITION.

To the Honorable Earl Warren, Chief Justice of the United States and Associates Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

"The petition of William W. Rabin shows to this Honorable Court:

SUMMARY OF MATTER INVOLVED.

Your petitioner was convicted on four counts of violations of Section 2315, Title 18, of the United States Code. The indictment with nine counts was returned July 13, 1960. The case was tried before a jury which returned a verdict of guilty as to the petitioner, William Rabin, on March 14, 1962 on the first four counts of the indictment. The defendant was sentenced to 10 years and fined $10,000 and costs on each of Counts I, II, III and IV of the indictment. Sentences on Counts II, III and IV were to run concurrently with each other and concurrently with Count I. The fines on Counts I, II, III and IV were to be cumulative.

In its original posture the indictment No. 60 CR 348 (App. 3) was in nine counts, the first four of which charged the petitioner, William Rabin, individually with a violation of Section 2315, Title 18, United States Code, that is to say, that he with unlawful and fraudulent intent did pledge to the Central National Bank in Chicago, Illinois as security for a loan securities of a value in excess of $500, to-wit, various Dominion of Canada bearer bonds, which said securities were a part of and constituted interstate and foreign commerce and were moving as such from Brockville, Ontario, Canada to Chicago, Illinois, and which securities had been stolen from the Brockville Trust & Savings Company, Brockville, Ontario, Canada. The first four counts alleged the pledging of various numbers of these bonds in various values and on four separate dates.

Count V of the indictment charged that beginning on or about January 29, 1959 and continuing to and including February 13, 1959, the petitioner did unlawfully and wilfully conceal certain securities in a value in excess of $5,000, the securities being alleged as nine Dominion of Canada bearer bonds of a total stated maturity of $9,000 which were a part of and constituted interstate and foreign commerce and were moving as such from Brockville, Ontario, Canada to Chicago, Illinois, which said securities had theretofore been stolen from the Brockville Trust & Savings Company, Brockville, Ontario, Canada. Defendants, Sam Mannarino and Norman Rothman, were also charged in this count with aiding and abetting the petitioner Rabin, all in violation of Section 2315, Title 18.

Count VI charged the petitioner Rabin with devising a scheme and artifice to defraud and alleged that the persons to be defrauded were banks and banking institutions in the United States and Europe, including the Central National Bank in Chicago, and further charged as a part of the

scheme that the petitioner Rabin secured certain Canadian bonds that had been stolen and that he sought to convert them into money and credits in banks and banking institutions in the United States and Europe; that to effect this scheme he concealed the stolen character of the bonds and that to effect this fraudulent scheme he did cause to be transmitted by means of wire and radio a communication in interstate and foreign commerce from Chicago, Illinois to Basel, Switzerland. Sam Mannarino, Norman Rothman and George Eric Rosden were charged as aiders and abettors in forming the scheme, all in violation of Section 1343, Title 18, United States Code.

Count VII, after re-alleging all of the allegations of the first six paragraphs of Count VI, charged the petitioner, William Rabin, with causing to be transmitted by means of wire communication a long distance phone call for the purpose of executing the aforesaid scheme and charged the defendants Mannarino, Rothman and Rosden with aiding and abetting the petitioner Rabin, all in violation of Section 1343, Title 18, United States Code.

In Count VIII the Grand Jury again re-alleged all of the allegations in paragraphs 1 to 6 of Count VI of the indictment and further charged that the petitioner, William Rabin, for the purpose of executing the scheme hereinbefore described, caused to be transmitted by means of wire communication in interstate and foreign commerce a cablegram and that the defendants Mannarino, Rothman and Rosden did aid and abet the defendant Rabin, all in violation of Section 1343 of Title 18, United States Code.

Count IX of the indictment charged that from on or about August 15, 1958 to and including June 30, 1959 at Chicago, Illinois in the Northern District of Illinois, Eastern Division, the petitioner Rabin, and the defendants Mannarino, Rothman and Rosden together with co-con-

spirators not named as defendants, Giuseppe Cotroni and Rene Robert, with conspring with each other and other persons, whose names were to the Grand Jury unknown, to commit offenses against the United States law, that is to say, Sections 1343 and 2315 of Title 18 of the United States Code, that is to say further, that it was their intention and object to pledge, aid, abet, counsel, induce and procure the pledging of securities in excess of $500 and for the purpose of defrauding banks and banking institutions to cause to be transported in interstate and foreign commerce and to use the manner and means of interstate and international wire and communication to effect a scheme and artifice to defraud, all in the manner and description as hereinbefore set out more particularly in Counts I to VIII, inclusive, of this indictment, and further alleged eight overt acts, all in violation of Section 371, Title 18, United States Code.

At the conclusion of the Government's case, the motion of the defendant Rothman for judgment of acquittal was granted and the said defendant was discharged.

At the conclusion of all of the evidence, on motion of the defendants involved, the Court ordered Counts VII and VIII dismissed and ordered Count V dismissed as to the defendant Mannarino.

The case was submitted to the jury and the jury returned a verdict of acquittal as to the defendant Mannarino in Counts VI and IX of the indictment, the only counts that remained against him.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

2. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal on the same matter.

3. An exercise of this Court's power of supervision is required.

SUMMARY OF ARGUMENT.

The Court of Appeals erred in its opinion when it held that in the application of Section 2315, Title 18, United States Code, it is of no import whether Canada has a law which proscribes the conduct perpetrated in the forced entry of the Brockville Bank and that courts and juries of the United States may take judicial notice of such matters of common knowledge.

The Court of Appeals erred in its opinion in holding that the District Court could presume the bonds taken would be considered stolen under Canadian law.

The Court of Appeals erred in its opinion in finding that the petitioner was not prejudiced by being compelled to go to trial on a multiple count indictment, including a conspiracy count, when the trial court permitted improper evidence to be introduced and considered by the jury.

ARGUMENT

I.

THE PROSECUTION MUST PROVE THAT THE ALLEGED UNLAWFUL TAKING WHICH OCCURRED OUTSIDE THE TERRITORIAL LIMITS OF THE UNITED STATES WAS SUCH A CRIME AS TO COME WITHIN THE PURVIEW OF SECTION 2315, TITLE 18, OF THE UNITED STATES CODE.

The unlawful taking charged in the first four counts of the indictment is alleged to have taken place on or about May 4, 1958 from the Brockville Trust & Savings Company, Brockville, Ontario, Canada. In support of this allegation in the indictment the prosecution rested its case on the testimony of Leslie Sterrit (App. 12) and Paul Smith (App. 22), both of Brockville, Ontario. Sterrit testified as to his investigation at the bank and Smith testified as to how the bonds in question were kept in the bank and what records were kept of them. No evidence was introduced at any time to indicate that the taking, as testified to, consisted of a violation of any Canadian law. There is no evidence in the Record that any such taking, as described, could have been submitted to the Court and the jury in support of any of the four counts in the indictment of which the petitioner was found guilty. This charge is laid under a statute of the United States and there was no evidence upon which the Court could take judicial notice that the taking, as alleged, was a violation of any law of the United States nor was there any evidence before the Court that there was a violation of a law of Canada. There are very specific definitions of the term "stolen", such as come

under the statutes under which this indictment was laid. There is no evidence that whatever the incident was that took place in Brockville, Canada, it was a violation of the law such as would come within the purview of the statute of the first four counts here involved.

In *Rowan, et al. v. Commissioner of Internal Revenue* (5th Cir. Ct. of App.), 120 F. 2d 515 at 516, the Court, in discussing the propositions that were advanced in that case in connection with a tax due, had this to say:

> "It is impossible for the Court to determine what income taxes accrued to the Republic of Mexico during the year 1937 from these taxpayers without construing the revenue laws of the Republic of Mexico in the light of the facts of this case. The record in this case contains no proof of what those laws are, and the rule that courts of one country cannot take cognizance of the laws of another without plea and proof has been consistently maintained in the courts of the United States."

This Court in discussing the same proposition in the case of *Liverpool & Great Western v. The Phoenix Insurance Company*, 129 U.S. 789 at page 793, in discussing a matter which was laid under the laws of Great Britain, had this to say:

> "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and like any other foreign laws, a matter of fact which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained at law and in equity in England and in America."

The Court's attention in this connection is also directed to the cases of *Hartzell v. United States*, 72 F. 2d 569;

Pierce v. Idseth, 106 U.S. 546; *U. S. v. Lavish*, 17 F. 2d 200; and *Application of Chase Manhattan Bank*, 191 F. Supp. 206.

The Government chose the forum in which to bring the prosecution and the format of the indictment, it was incumbent upon the prosecution to prove each and all of the essential elements necessary for conviction and this it failed to do.

II.

IS IT POSSIBLE FOR A DEFENDANT TO OBTAIN A FAIR TRIAL WHEN BY APPLICATION OF MULTIPLE COUNTS IN AN INDICTMENT, ALL INCORPORATING THE SAME OFFENSE OR OFFENSES, THE PROSECUTION INTRODUCES UNDER THE CONSPIRACY THEORY EVIDENCE WHICH WOULD NOT BE ADMITTED TO SUPPORT THE CHARGE IN THE SUBSTANTIVE COUNTS.

As has been pointed out, the indictment in the instant case consisted of nine counts and in all nine counts the petitioner herein was named. Various of the other counts alleging transmission by means of wire and radio of communications in interstate and foreign commerce also set forth a scheme or artifice to defraud. In each of these counts the first four counts of the indictment were incorporated. The ninth count of the indictment charged an overall conspiracy. It is evident from the manner in which the indictment was drawn and the evidence that was adduced at the trial that the prosecutor sought again by the device of the conspiracy charge to sweep together various alleged defendants from different parts of the United States and charged them with a multiplicity of crimes for the simple purpose of trying to show by some association an affiance in the crime.

That in the instant case this prejudicial joinder of defendants and counts was compounded is evident from

the excerpts from the voluminous transcript which is a part of the record here. The Court's attention is directed to the testimony of the witness Lagroix (App. 98) with relation to the introduction of an extra indictment offense in no way connected to any of the charges in the indictment. Attention is also directed to the testimony of the witnesses Hoyt (App. 187-221) and Voight (App. 227) in which, over objection, conversations completely irrelevant to the issues involved but highly prejudicial were admitted against the petitioner on the sole basis that they were in furtherance of the conspiracy charged; the appearance of the witness Tomlinson (App. 240-246) when the prosecution knew, prior to his taking the witness stand, that he would refuse to testify and that this refusal could only be prejudicial to the petitioner and the completely irrelevant and prejudicial testimony of the witness, Edward L. Smith (App. 255-275), who was, on cross-examination, demonstrated to be a witness completely unworthy of belief.

With the proposition that the verdict returned by the jury is not inconsistent, the petitioner has no quarrel but it is strenuously argued to this Court that under all of the attendant circumstances, he could not receive a fair trial. It would be impossible to believe as stated by Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 at page 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States*, 332 U.S. 559, 92 L. ed. 154, 169, 68 S. Ct. 248, all practicing lawyers know to be unmitigated fiction. * * *".

No trial judge no matter how fair or impartial could remove from the jury's mind the evidence that they had

heard concerning all of the transactions that were permitted to be testified to.

This case then stands as typical of the practice of prosecutors in returning an indictment charging various crimes and conspiracies and trying to engulf the defendants by overwhelming prejudicial evidence in a situation where they cannot by any stretch of the imagination extricate themselves.

This Court's attention is directed to the language in *Dotson v. United States*, 215 F. 2d 196 at page 199, wherein it was stated:

> "The opportunities for oppression that exist when prosecutors seek to 'sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders' have long been recognized. *United States v. Falcone*, 2 Cir., 140, 109 F. 2d 579, 581, affirmed 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128; see Mr. Justice Jackson's concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, at pages 445 to 454, 69 S. Ct. 716, 93 L. Ed. 790.
>
> "'A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.' *Krulewitch v. United States*, 336 U.S. 440, at page 454, 69 S. Ct. 716, at page 723 (concurring opinion). That, we think, was the situation here."

The case from the verdicts of the jury may properly be characterized as a close one. The competent evidence to connect the petitioner with those counts on which the jury returned a guilty verdict is practically non-existent. Where the evidence is weak and the case is close upon the facts, it is important that no error should intervene

which might prejudice a defendant. The importance of this to the petitioner cannot be emphasized more than to point out that he has received concurrent sentences of 10 years on each of the four counts upon which he was found guilty.

It is respectfully submitted that the errors complained of are of such a substantial nature that this Court should take notice of them and in its supervisory capacity should correct the ever-growing vice of dragnet indictments and once again restore to defendants that right given them by the Constitution of the United States to be specifically charged with a particular offense which they may properly meet under all the safeguards provided by law for those charged with crime.

PRAYER FOR WRIT

Wherefore your petitioner prays that a writ of certiorari be issued directed to U. S. C. A. for the Seventh Circuit and such further relief as may seem just.

WILLIAM W. RABIN,
Petitioner.

RICHARD E. GORMAN,
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Chicago 2, Illinois,
Attorney for Petitioner.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1962—April Session, 1963

No. 13804

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM W. RABIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 25, 1963

Before HASTINGS, *Chief Judge*, CASTLE, *Circuit Judge*, and MERCER, *District Judge*.

CASTLE, *Circuit Judge*. William W. Rabin, defendant appellant, was convicted following a jury trial of violations of 18 U. S. C. A. § 2315 charged in the first four counts of a nine count indictment. He was sentenced to imprisonment for ten years and fined $10,000 and costs on each of the four counts. The sentences of imprisonment are to run concurrently but the fines are cumulative.

The counts upon which he was convicted[1] charged defend

1. The appellant was acquitted on Cout V which charged him with unlawful concealment of stolen securities so transported in violation of § 2315. He was acquitted on Count VI which charged him with devising a scheme and artifice to

ant-appellant, individually, with pledging to a Chicago bank as security for loans on each of four separate dates a designated number of stolen Canadian bearer bonds of a stated value in excess of $5000 in each instance. The counts charged that said securities were a part of and constituted interstate and foreign commerce and were moving as such from Brockville, Ontario, Canada, where they had been stolen, to Chicago, Illinois, and that the defendant knew the securities to have been stolen and made said pledges with unlawful and fraudulent intent, willfully, knowingly and feloniously in violation of § 2315.

The main contested issues presented by defendant's appeal are:

> (1) Whether in order to establish the offenses of which defendant was convicted it was essential that proof be made of Canadian law to show that under such law the taking of the securities was such as to characterize them as securities "stolen, unlawfully

defraud, involving the use of stolen Canadian securities, and sending a communication by wire and radio in interstate and foreign commerce for the purpose of executing the same, in violation of 18 U. S. C. A. § 1343, and charged Sam Mannarino, Norman Rothman and George Eric Rosden as aiders and abettors. He was acquitted on Count IX which charged him, Mannarino, Rothman and Rosden (and named Giuseppe Cotorni and Rene Robert as co-conspirators but not as defendants) with conspiracy to violate § § 1343 and 2315 in connection with the pledging etc. of such stolen and transported securities, in the manner and description set out in Counts I to VIII, inclusive, in violation of 18 U. S. C. A. § 371. Counts VII and VIII which charged violations of § 1343 similar to Count VI but alleged the means of communication to be a long-distance phone call and a cablegram, respectively, were dismissed on motions of the defendants involved at the conclusion of all the evidence.

At the conclusion of the Government's case a motion by defendant Rothman for acquittal was granted. Defendants Mannarino and Rosden were acquitted by verdict of the jury.

converted, or taken" within the meaning of 18 U. S. C. A. § 2315.

(2) Whether there was evidence to establish:

(a) that the securities pledged were a part of or moving in interstate or foreign commerce, and

(b) that defendant had knowledge of the stolen character of the securities he pledged.

(3) Whether the trial of the defendant on the multiple counts, including the conspiracy count, resulted in such prejudice to the defendant as amounts to a denial of a fair trial and an abuse of due process.

The record discloses that sometime early in the morning of May 4, 1958, the premises of the Brockville Trust and Savings Bank, Brockville, Ontario, Canada, were broken into. The north wall of the bank's vault had been forcibly entered and a hole approximately 22 inches in diameter had been made therein. In the vault itself, holes had been cut through the doors of two safes and the combination lock had been knocked off a third. On the floor of the vault there was a considerable amount of charred papers and bonds. Tools such as crowbars, picks, electric drills, and acetylene torch cutting equipment were spread about the premises. In excess of $3,000,000 worth of Canadian bonds which had been in the vault for safe-keeping were missing. The next day $1,200,000 worth of bonds which had been taken from the bank were found in a railway station locker in Montreal. Brockville is located midway between Montreal and Toronto, Canada.

The defendant pledged Canadian bearer bonds, identified as among those taken from the Brockville bank, with a Chicago, Illinois, bank as security for loans made him. These transactions took place on September 16, September 29, October 1, and October 2, 1958, and involved bonds valued at $13,700, $16,300, $10,000 and $89,000 respectively. In each instance the pledge was made shortly after the defendant returned from a trip to Montreal. He was in

Montreal on September 11, September 27, and September 30, 1958.

The foregoing is but a partial summary of the evidence but it will suffice to serve as a preface to a discussion of the issues raised on appeal.

The defendant contends that to establish the offenses for which he was convicted it was incumbent upon the government to make proof of the law of Canada and to establish by such proof that the taking of the securities from the bank at Brockville was a violation of the law of Canada. He relies, in this connection, on the application of the doctrine that United States Courts may not take judicial notice of the laws of a foreign country. But such reliance is misplaced. In the application of § 2315 it is of no import whether Canada has a law which proscribes the conduct perpetrated in the forced entry of the Brockville bank and the taking and carrying away of the securities entrusted to its care with intent to deprive the owners thereof. Wherever the right to possess property is recognized the taking and carrying away of the property of another without his consent and with intent to deprive him of it is stealing. And this would remain so apart from the promulgation of a specific legal interdiction of such conduct. And courts and juries may take judicial notice of such matters of common knowledge.

A contention similar to that advanced by defendant was rejected in *United States* v. *Greco*, 2 Cir., 298 F. 2d 247, 250, 251, where it was stated:

> "Appellant also argues that there was insufficient evidence for the trial court to infer that the bonds involved were stolen. However, a hole cut in a bank vault wall, an acetylene torch lying nearby and testimony (by stipulation) that the bonds involved in this case were among those missing are facts sufficient to support an inference of theft."

> "Appellant contends that the federal statutes involved are not applicable when the securities were not stolen in this country. However, the language of the present statute is broad enough to justify the federal courts in applying the statute whenever they determine that the securities were stolen in another country. We are not here concerned with the unlikely case where the goods or securities might be 'stolen' according to the laws of one of the two countries and yet not be 'stolen' according to the laws of the other country. In the absence of citation of statutes or decisional authority to the contrary, we may presume that these securities would be considered stolen under Canadian law."

On the issue as to whether there is evidence to support the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Shaffer*, 7 Cir., 291 F. 2d 689, 691. And from our examination of the record we are of the opinion that there is substantial evidence to support reasonable inferences that the securities pledged were a part of and moving in interstate and foreign commerce and that the defendant had knowledge of their stolen character.

The defendant's trips to Montreal, where a large part of the stolen securities were found the day after the theft, immediately preceding each pledge he made of a portion of the stolen bonds in Chicago afford reasonable basis for the jury to infer that such bonds were being brought from Canada to Chicago for disposition—a movement in interstate and foreign commerce. *Gable* v. *United States*, 7 Cir., 84 F. 2d 929, relied upon by the defendant is inapposite here. In *Gable* there was no evidence which placed the defendant in the vicinity of the place of the theft, or a place to which proceeds of the theft had been removed, immediately prior to his possession of them and attempt to dispose of them in a different state. In addition, the statute

at the time of the offense charged in *Gable* was limited to situations where the securities had been stolen *while* moving in or constituting a part of interstate or foreign commerce. § 2315 contains no such limitation. Thus, the observation made in *United States* v. *Rocco*, D. C. Pa. (1951), 99 F. Supp. 746, 749; aff'd *per curiam* 193 F. 2d 1008, is appropriate here:

> "Defendant also attacks his conviction on the ground that the interstate character of the securities had terminated at the times they were sold. Here again, from the circumstances, the jury could infer that he transported or was instrumental in transporting these securities from the place of theft into Pennsylvania for sale at or about the time they were sold. Adapting *McNally* v. *Hill*, 3 Cir., 1934, 69 F. 2d 38, it is certain that there comes a time in the transportation of stolen securities from one state to another when transportation ceases. If, at that moment, they lose their quality of 'moving as,' or 'which are a part of' or 'which constitute' interstate commerce then always it would be impossible to enforce the statute against the sale or disposition of stolen securities. Plainly the statute contemplates a situation where the sale is an incident to the theft and transportation which preceded it, and when the sale is so tied up with the interstate transportation in furtherance of the scheme to unlawfully dispose of the stolen securities and constitutes the last step thereof, the characteristic of interstate commerce is preserved and the federal *jurisdiction for trying the* offense of sale or disposition is maintained."

The record discloses numerous other circumstances, and actions of the defendant, which warranted a reasonable inference that defendant was aware of the stolen character of the securities he pledged in Chicago. Included are the following. There was evidence that defendant withdrew Canadian bonds he had deposited with a banking institution in Zurich, Switzerland, as security tendered in connection with a loan he sought to obtain, when the bank suggested that a check be made in Canada with respect to the title of the bonds. Although current interest coupons were

removed by defendant from bonds he pledged he did not present such coupons for payment. On the occasion of the October 2, 1958, transaction with the Chicago bank the defendant, when questioned as to the source of the Canadian securities, stated that he had received them from his mother's estate. In connection with the attempt to secure a loan at Zurich, and in connection with the pledge of stolen Canadian bonds as security for a loan obtained in Basel, Switzerland, it was represented that the defendant had made millions during the war which he had invested in Canadian securities. On another occasion the defendant stated he had received the bonds as payment for his services to arrange shipment of arms to the Castro forces in Cuba.

We conclude that there was ample evidence, relevant to the offenses charged in the four counts on which the defendant was convicted, to warrant the jury in returning the verdicts it did.

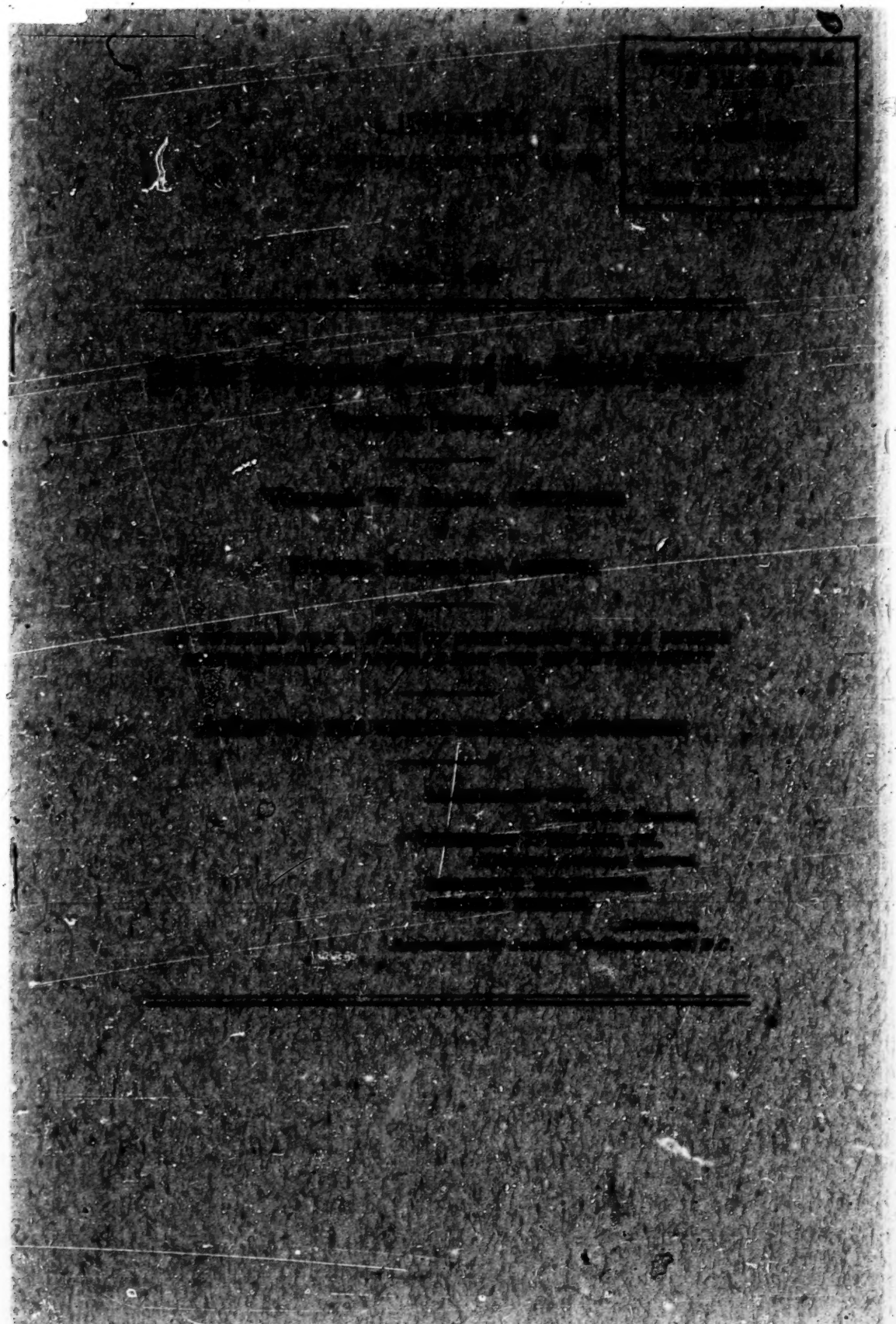
We are not persuaded by defendant's argument that his prosecution on multiple counts in some of which, including the conspiracy count, others were joined resulted in prejudice which deprived him of a fair trial and violated his right to due process. The joinders of offenses and defendants were proper (Rule 8, Federal Rules of Criminal Procedure). Thus, we are concerned only with whether in the trial of the cause actual prejudice to a substantial right of the defendant resulted from such joinders. *Schaffer* v. *United States*, 362 U. S. 511. The defendant was acquitted on Counts V, VI and IX. On the record before us there is nothing to indicate that the jury in reaching the verdicts it did improperly considered evidence material only to the guilt of others or to the proof of other offenses.[2] The

2. The evidence as to the Switzerland transactions and concerning the representations made as to the source of the bonds was admissible in connection with the substantive offenses charged in the first four counts. *United States* v. *Wall*, 7 Cir., 225 F. 2d 905, 907.

verdicts of acquittal support such conclusion. Unlike *Krulewitch* v. *United States*, 336 U. S. 440 and *Dodson* v. *United States*, 6 Cir., 215 F. 2d 196, relied upon by defendant, there was no conviction here under a joint or conspiracy count upon which to predicate any contention the convictions were based on evidence of wrongdoing by others and a belief of the jury "that birds of a feather are flocked together". The admonitions contained in those cases have no application here. And the acquittals demonstrate the defendant was not prejudiced by a "transference of guilt"—a danger pointed out in the *Kotteakos* case, 328 U. S. 750, 774—nor by the substitution of the "feeling of collective culpability for a finding of individual guilt" mentioned in *United States* v. *Bufalino*, 2 Cir., 285 F. 2d 408, 417.

The judgment order of the District Court is affirmed.

AFFIRMED.



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690-781—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 144

WILLIAM W. RABIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1963. The petition for a writ of certiorari was filed on May 20, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that a Canadian bank vault containing bonds had been forcibly entered and the bonds taken was sufficient to shew that the bonds were "stolen" within the meaning of 18 U.S.C. 2315.

2. Whether petitioner was denied a fair trial by the joinder of a conspiracy count with the substantive counts.

STATUTE INVOLVED

Section 2315 of Title 18 U.S.C. provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or mechandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;
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> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts charging him alone with pledging stolen bonds, knowing them to have been stolen, in violation of 18 U.S.C. 2315. The indictment on which petitioner was tried contained five additional counts charging him and several others with concealing stolen securities, mail fraud, wire fraud, and conspiracy to commit such offenses. All the defendants were acquitted or obtained dismissals as to these counts. Petitioner was sentenced to ten years' imprisonment and fined $10,000 on each count, the

sentences to run concurrently and the fines to be cumulative. The conviction was affirmed by the court of appeals.

The government's evidence showed that on May 4, 1958, someone forcibly entered a bank located in Brockville, Ontario (A. 13–14).[1] A large hole had been made in the bank's vault and the entire area contained charred wood and paper, rubble, and smoke (A. 14–15). Numerous tools were found in the vicinity—including a sledge hammer, punch, electric drills, chisels, picks, crowbars, and acetylene cutting equipment. Various Canadian bonds, previously in the vault, totaling over several million dollars in face value, were missing (A. 27, 36–37; Ex. 3).

More than a million dollars worth of the missing bonds were found in Montreal the day after the robbery (A. 20) and an attempt to pledge six others was made in Montreal in July 1958 (A. 99, 105–106). During late May or early June 1958 in Montreal, one Cotroni offered $3,000,000 worth of the bonds for sale at 21 cents on the dollar to government witness Smith (A. 282). Before Smith had spoken with Cotroni he had seen Cotroni in the company of Sam Mannarino (A. 261, 264, 312). In early September 1958, Mannarino had a room on the same floor of a Montreal hotel as petitioner and checked out at the same time on September 11 (Ex. 22A; A. 348). Petitioner was also shown to have been in Montreal on Septem-

[1] "A." and "G.A." refer, respectively to petitioner's separate 353-page appendix in the court of appeals and a fifteen-page appendix appearing in appellee's brief in that court, both of which have been filed with this Court along with the exhibits.

ber 19 and 25 (Exs. 20–B and–C; A. 351). Petitioner pledged a total of $129,000 of the missing bonds as collateral for four loans at a Chicago bank between September 16 and October 2, 1958.

In the original conversation between Cotroni and Smith, Cotroni said that the bonds in question were "supposed to go to Europe" (A. 324). After he made the four pledges of bonds in Chicago, petitioner traveled to Europe. Before leaving, petitioner talked about obtaining credit from a travel agency, stating that he had had "enough bonds to take care of any obligations" (A. 193). In Europe petitioner and Rosden, his attorney, attempted to pledge some Canadian bonds (G.A. 3, 6–7). When one of the European banks wanted to communicate with Canada to verify the "titles" of the bonds being offered by petitioner and Rosden, the latter, in petitioner's presence, refused to agree to that procedure saying that he had to talk the matter over with petitioner (G.A. 4). Ultimately the bonds in question were withdrawn. Another European banker testified that on October 17, 1958, when he discussed investments with petitioner, "Mr. Rabin very enthusiastically spoke about his lust for money, and power, and he once—he said, 'Once I had a pile of one million bank notes on the table and then I swept it away'" (G.A. 12).

While in Europe in October, petitioner did succeed in pledging $140,500 of the stolen bonds with a Swiss bank in return for $47,000 in United States dollars and some $29,000 worth of Swiss francs (Exs. 71, 105). When this bank found that its security was in jeopardy, it pressed petitioner for payment and there was

an arrangement for repayment without publicity. Between January 20 and 22, 1959, petitioner and Mannarino were again in Montreal at the same hotel (Exs. 23–B, 22–E). On January 24, petitioner sent a $10,000 money order in partial payment of the Swiss account (Exs. 56, 71). On January 29, petitioner appeared at the Chicago bank and redeemed $9,000 in the pledged bonds. Petitioner asked which bonds were next due to mature, and when told that they had almost been sold, he said, "Oh, no. Well, I want to give you some money" (A. 174).

Petitioner on different occasions explained his acquisition of the bonds in varying ways. On October 2, at the time of the last pledge in issue, he told an official of the Chicago bank that "he got them from his mother's estate" (A. 170). Shortly thereafter, he and Rosden told European bankers that petitioner had obtained the Canadian bonds through wartime profits (G.A. 6, 10–11). Rosden testified that petitioner told him that the bonds represented payment for services rendered in connection with shipping arms to Castro supporters in Cuba (A. 327–329).

ARGUMENT

1. Section 2315 of Title 18 makes illegal the pledge for a loan of securities worth $500 or more moving in interstate or foreign commerce, "knowing the same to have been stolen, unlawfully converted, or taken * * *." Since the bank vault was forcibly entered and the bonds were then discovered missing, there was ample justification for the conclusion that, in the language of the indictment, the bonds had been

"stolen and unlawfully taken." That is all that had to be proved since neither the statute nor the indictment require any fine technical distinctions among various crimes of unlawful acquisition. It hardly needed an expert on Canadian law to show that forcible entry and removal of property is theft—an act which has been a crime throughout history. *United States* v. *Greco*, 298 F. 2d 247, 250–251 (C.A. 2), certiorari denied, 369 U.S. 820. Thus, in *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 478, this Court assumed that the "rudimentary" tort of conversion would incur liability "in all civilized countries."

2. Petitioner argues (Pet. 9–12) that he was denied a fair trial by the joinder of the conspiracy count with the substantive counts. He reasons that the unfairness was aggravated in this case because the competent evidence of guilt was "practically non-existent" and the government introduced irrelevant testimony.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that two offenses may be charged in the same indictment if the offenses charged "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." This Court has held that the joinder of conspiracy and substantive counts pursuant to this rule does not deprive defendants of a fair trial, unless the defendant demonstrates that actual prejudice resulted. *Schaffer* v. *United States*, 362 U.S. 511.

Here, the conspiracy and substantive counts involved acts of the same character arising out of the

same series of transactions. Petitioner's only arguments that the joinder prejudiced him concern the sufficiency of the evidence and the admission of allegedly irrelevant testimony. However, if petitioner were correct in these arguments, his conviction should be reversed on these grounds alone—they do not establish that the joinder was improper. Moreover, both claims are plainly erroneous.

The Statement, *supra*, demonstrates that petitioner's conviction is amply supported by the evidence. Since, as we have shown above, the government proved that the bonds were unlawfully taken and there is no dispute that the bonds were pledged by petitioner and moved in foreign commerce from Canada to the United States, the sole issue is whether there was proof of petitioner's guilty knowledge. The large amount of bonds possessed by petitioner, his inconsistent accounts of how he acquired them, his presence in Montreal where the stolen bonds had been brought, his reluctance to permit bonds to be checked by the European banks with which he attempted to do business, his dismay in learning that some of the pledged bonds had almost been sold, all support the conclusion of the jury that petitioner participated in efforts to dispose of the bonds and thus knew that the pledged bonds had been stolen.

The specific evidence which petitioner cites as prejudicial was relevant not only to the indictment as a whole but also to the four counts on which he was convicted, since it concerned the elements of knowledge and intent. The testimony of witnesses Lagroix and Smith dealt with the attempted sale

and pledging of bonds by two individuals in Montreal. This evidence was relevant as tending to show that the center of operations with respect to the stolen bonds was Montreal where petitioner was shown to have been shortly before each of the pledges for which he was convicted. Similarly admissible was the evidence of travel agents Hoyt and Voight as to conversations with petitioner and with another person in petitioner's presence. Contrary to petitioner's suggestion (Pet. 10), this testimony was admitted solely against petitioner (A. 189–190, 194, 198, 228, 230, 233) and not on any conspiracy theory. The travel agents testified, *inter alia*, that petitioner told them that he was carrying large amounts of bonds on his trip to Europe (A. 193; see A. 232), that he was obtaining capital in Montreal (A. 196–197), and that he clipped bond interest coupons all one morning (A. 200–201). This evidence tended to show that petitioner was part of the efforts to dispose of the bonds and knew that they had been stolen. While petitioner contends that he was prejudiced by the fact that the witness Tomlinson[2] claimed the privilege against self-discrimination, it is sufficient to say that, at the prosecutor's suggestion, the privilege was invoked outside the presence of the jury (A. 246–253).[3]

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[2] Tomlinson was shown to have made travel arrangements for petitioner (A. 190–199) and that later, in December, he was at a motel at the same time as Cotroni (Ex. 75; A. 351).

[3] At one point the court said "bring the jury back" (A. 250), but subsequent statements of both the judge and defense counsel show clearly that the jury never returned until Tomlinson had left the stand (A. 253–254).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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